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IN THE

Supreme Court of the United States

October Term, 1970

PAUL M. KAUFMAN,

Petitioner,

against

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner Paul M. Kaufman respectfully prays that a writ of certiorari issue to review a determination of the United States Court of Appeals for the Second Circuit rendered on July 22, 1970, affirming a judgment of the United States District Court for the Southern District of New York, convicting him of conspiracy and substantive violations of the Securities Act of 1933 and sentencing him to nine months' imprisonment on the conspiracy count, two years' probation on each of eleven substantive counts and fines totaling $24,000.

Opinion Below

The opinion rendered below was that of the United States Court of Appeals, written by Bonsal, D.J., sitting by designation. The opinion is not yet reported, and a copy is appended to this petition.

Jurisdiction

The judgment of the aforesaid Court of Appeals sought to be reviewed herein was rendered and entered on July 22, 1970.

The jurisdiction of this Court is invoked under 28 U. S. Code Sec. 1254. The basis for federal jurisdiction in the United States District Court was the provisions of 18 U. S. Code Sec. 371 and 15 U. S. Code Sec. 77Q(a).

Questions Presented for Review

The case presents the following questions, each of which will be discussed under the reasons for allowance of the writ:

1. Did the evidence establish the commission by this petitioner of any crime?

2. Did the evidence prove any use of the mails as charged and as required by the statute?

3. Was the prosecution for conspiracy barred by its claimed consummation?

4. Was the ruling excluding the place of residence of the government's principal witness reversible error?

5. Was the admission of evidence of another alleged crime error?

6. Was it error to strike the testimony of petitioner's principal character witness, a Justice of the New York Supreme Court?

7. In answering the jury's specific questions, did the Court err in its apparent affirmance of petitioner's guilt?

Statutes Involved

18 U. S. Code Sec. 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons commit any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both."

15 U. S. Code Sec. 77Q(a) provides as follows:

> "It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly
>
> "(1) to employ any device, scheme or artifice to defraud, or
>
> "(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> "(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser."

Statement of Case

The indictment (68 Cr. 485) charged ten defendants in seventeen counts, of which twelve eventually went to the jury. In brief the gravamen of the prosecution was an alleged conspiracy to cause the stock of Dunbar Development Corporation to be sold through a scheme to defraud involving use of the mails. The scheme alleged by the government was that statements would be made containing

omissions of material facts, namely, that secret payments were being made to brokers to induce them to cause customers to buy the stock.

In view of the extraordinary length of the trial and to avoid needless repetition, the evidence in so far as it affected petitioner will be treated under the first point of the reasons hereinafter presented for the allowance of the writ. Numerical references indicate pages of the record below.

REASONS FOR ALLOWANCE OF WRIT

I.

The evidence adduced against petitioner fails to establish the commission by him of any crime.

The main witness for the prosecution was one Mark P. Binstein, who had been convicted on his plea of guilty in another case involving stock fraud (299, 306, 308). Another government witness, Eveline Gold, described him as "a born cheat" (1558). Binstein told of a scheme conceived by one Daniel Kroll, who died in August, 1963 (101). Previously Binstein had founded a firm named National Market Relations (103). It was in April or May, 1963, that Binstein met Kroll (109), who was an officer of Donbar Development Corporation, a corporation engaged in real estate development (105), hereinafter referred to as Donbar. Kroll told Binstein that the Securities and Exchange Commission had granted him a "no action" letter, and that Kroll wished to sell the 40,000 shares of Donbar stock which he owned (106, 2132), explaining that he was being victimized by others who were so operating as to decrease the value of his shares. Consequently he was seeking to enlist aid in effecting the sale of those shares (106-107) by cornering the market so as to cause the price to rise, the shares being in the over-the-counter field (106, 108); to

preserve the value Kroll had decided to purchase additional shares. Kroll's position was the result of dealers selling short (108), so that if the stock were to rise in value, the short sellers would be obliged to buy to cover and would have to resort to the holders, such as Kroll or his nominees, to make good on their short sales (108). The procedure was explained by another government witness, George C. Seifried, a supervisory securities investigator of the Securities and Exchange Commission (2638-2641). Binstein proceeded to tell that he arranged with Kroll to enlist the services of brokers to participate under an agreement that they would receive $100 for every hundred shares of stock they purchased (110).

At a subsequent meeting, according to Binstein, the defendant Garber informed him and Kroll, pursuant to arrangement, of Donbar's market position (112). Garber was the principal of a firm called Nassau Securities, and he was supposed to buy Donbar either in his own or the firm's name, while Kroll agreed to make good any losses incurred by reason of the difference between the price at which Garber bought and the selling price (114). Garber was also to report to Binstein the amount of shares bought and the identity of sellers and purchasers, the latter being Kroll's nominees (114-115). Binstein proceeded to enlist nominees to buy Donbar, such nominees to be insured by Kroll against any loss (116-120, 135-142, 180-182). Government's Exhibit 1 was a record kept by the witness of Donbar security transactions (126-128).

The buying of Donbar began on May 16, 1963 (144-146). This particular angle of Kroll's plan was obstructed by the practice of "backdooring," a procedure explained by Binstein as a plan of some brokers to sell short in the knowledge that Donbar could be procured from Kroll at a price below the market, while other brokers would buy the stock elsewhere in the knowledge that Kroll would pay for the purchase (146-147). Binstein told of obtaining the aid

of certain brokerage firms, including Eastman Dillon & Co. through a Herbert Kutlow and Harris, Clare & Company (154-165); all three principals of the latter firm—Clare, Winslow and Summers—later testified for the government. Finally, between May and June, 1963, Binstein, as he informed codefendant Alan Florea, dropped out of the plan since Kroll was dealing directly with Harris, Clare (164-165).

We now come to the alleged involvement of Paul M. Kaufman, petitioner herein. Binstein testified that he met Kaufman at the latter's law office late in May or early in June, 1963, Kroll being present (244). The essence of his testimony at this point was as follows (244-246):

> "Mr. Kroll was not satisfied with what was taking place, explained his dissatisfaction to Mr. Kaufman, who told him to—that he was doing it all wrong, it should be done through him, Mr. Kaufman; and he, in turn would protect Mr. Kroll from all the pitfalls of backdooring and lying and everything that he suspected was taking place by the brokers making the market in Donbar stock . . . The name of Burns & Co. was mentioned as being the firm who could successfully sell all the remaining shares that Mr. Kroll had . . . All arrangements should be made with Burns, and all payments—with Burns directly, and all payments should be made to Mr. Kaufman in advance in cash to insure success, and to eliminate any chance of backdooring."

Later Binstein met Burns, who agreed to buy $15,000 worth of Donbar shares (247-248). Then, according to Binstein, Kroll directed him to deliver $4,000 in cash to Kaufman; that this was done and Kaufman told Binstein to assure Kroll that the transaction would be handled (248-249). Binstein had frequent subsequent meetings with Kaufman (252). Soon after, in June, 1963, the value of Donbar stock fell and Binstein's activities in the matter terminated (278). Binstein's meetings with Kaufman related

to other subjects. Kroll was present on one occasion when there was an altercation "concerning a fee, a legal fee for another matter, which Mr. Kroll thought was too high" (283), and "Mr. Kaufman told Mr. Kroll to consider the work done in Donbar" (284). Soon thereafter—in August, 1963—Kroll died (285).

The cross-examination of Binstein disclosed his involvement in a different stock fraud relating to Pentron Electronics wherein he had pleaded guilty in 1968 (297); that he distrusted Kaufman (300); and that he had testified before the grand jury that he was not aware of much distribution of Donbar stock in June, 1963 (304).

A parade of other witnesses followed, a number of whom, such as Irving Singer (984-986) and Doris Atlkind (1013), did not know petitioner. Another witness, Lee Richard Halperin, gave hearsay testimony, over objection, as to conversations between Kroll and Binstein (1056-1057); and told that Binstein gave him money in an envelope which he delivered to Kaufman (1064-1065). Halperin said that Kroll bought stock in Halperin's name and paid for it (1069).

Melvin Winslow, who had been convicted of conspiracy under the instant indictment (1392-1393) was an associate of Harris Clare & Company, broker-dealers, the others being Martin Clare and Robert Summers. He told of a meeting of all of them with Kroll and petitioner in the latter's office in May, 1963, when there was talk of selling Donbar and compensation therefor. On this occasion, according to Winslow, Kroll told of owning 40,000 shares of which he wanted to dispose (1394-1395). He could not remember what Kaufman said on this subject (1396). He said his firm was promised cash compensation if they sold the stock (1396), and that Binstein would pay for the shares they sold (1398). He told of selling Donbar to his customers (1398-1400), and telling the purchasers that the stock was speculative and a good investment—but

not that he was receiving cash consideration from Kroll for selling (1400). There were also meetings dealing with Kroll's contemplated purchase of an interest in the Harris firm, which was never consummated (1482).

Eveline Gold, formerly a registered representative at Flomenhaft & Company who had also worked for National Market Relations, knew petitioner, and told of money being left with him as escrow agent who would not otherwise trust Binstein or buy any stock (1578). She gave testimony as to other matters objected to by petitioner as being in no manner connected with him (1565). Incidentally, this was a procedure followed by the government throughout the trial in the face of repeated objections.

Robert Allen Summers, a codefendant who had pleaded guilty, told of discussions with Kaufman and that the latter had agreed to pay $1 per share for retailing Donbar (2333-2334); that he received payment from Clare (2338); that Kaufman never gave him any money (2346); and that he had testified falsely before the grand jury (2357-2359). He had other meetings at petitioner's office relating to the underwriting of a venture called Cosmopolitan Planning (2485). In retailing the stock he never told the customers about the price support or the cash payments (2339). In short, as appears from the testimony of all of the Harris Clare principals, in causing confirmations to be mailed to the customers, they did not disclose the cash consideration they were to receive under Kroll's plan. This testimony dealt with the substantive counts numbered 10, 11, 12, 13, 15, 16 and 17.

As to the other substantive counts—namely, 3, 5, 8 and 9—the government called customers to testify that they were not told about the support of the stock (2116). A typical purchaser was one H. Alfred D'Alois, who told of purchasing Donbar from a salesman who told him that it was a speculative stock (2115) and that he received a confirmation. Apart from this he could not remember what

the salesman told him (2117). Another purchaser, Nicholas Benvin (1260-1278), never met this appellant or any other defendant; the salesman, one Levine, merely recommended the stock but did not disclose support or cash payments (1267). There was no proof that the salesman was instructed by anyone to withhold such information.

Apart from character witnesses, the defense consisted in the main of petitioner's own testimony. He was born in 1931; he attended Yale University and the University of Pennsylvania (2815). He attended Columbia Law School, and upon his graduation entered into the practice of law in 1955 (2861). During 1963 he was a member of the firm of Kaufman, Stolzer, Frank & Kaufman (2816), of which his father, now retired, was the senior member. Kroll was a client of the firm, and from 1962 until April, 1963, his business was handled by a partner, Martin Frank (2816). When Kroll left Donbar, it was ascertained that he would have to pay a stamp tax for the transfer of certain shares to the corporation (2817-2818). Through an oversight this was not taken into account, whereupon petitioner assumed the difference and reduced the firm's bill to Kroll accordingly by $900 (2818). This incident created a bitter argument between Frank and Kroll, who asked petitioner to handle his affairs (2819). Regarding a proxy dispute with Donbar's officers, another partner of the law firm, Stolzer, took care of most of the material (2820-2821). Eventually Frank and Stolzer asked Kaufman if he would introduce Kroll to brokers and dealers who might be interested in retailing Kroll's stock. Kaufman was not asked to do anything illegal (2823-2824). His partners were likewise seeking to interest brokers. He introduced Kroll to codefendant Steven Burns, whose father, when connected with another brokerage firm, had been Donbar's underwriter (2824). This was in March, 1963, when Kroll wanted a list of Burns' customers who owned the stock so that he might solicit them in the proxy controversy. Burns was given financial and other literature

concerning Donbar, so that he might have good material for retailing the stock (2825-2826). This was in accord with Kaufman's usual practice with all broker-dealer clients (2826).

While his firm represented Harris, Clare & Company—Frank handling their legal matters—petitioner first met Summers and Winslow in May, 1963, when they were brought to his office by Kroll (2827).

With respect to the $4,000 held in escrow for Kroll, Kaufman explained that this sum was for a cemetery owned by Donbar which Kroll desired to purchase. Because of his strained relationship with Donbar he requested the law firm to make the proposal to Donbar. The initial arrangement was for the payment of $4,000, and this was subsequently changed to payment in two $2,000 instalments (2828). Kaufman's law partners insisted that, inasmuch as they were going to use their facilities and name in making the offer to Donbar, Kroll would have to give them the money in advance so that they should not be liable (2828-2829). He believed Binstein was with Kroll when the money was turned over to him (2829). He never held any money for Burns or for Harris Clare & Company as an escrow agent with regard to the sale of Donbar stock nor did he propose any such escrow (2829). The escrow for the cemetery purchase was returned to Kroll because the entity for the purchase was not created (2829). He never received any moneys for the sale of Donbar stock (2830). He had no dealings with regard to Donbar, and knew nothing about secret compensation until after Kroll's death (2831). He had no connection with any scheme to rig the market or pass secret compensation in relation to Donbar stock (2832). He represented Binstein before the Securities and Exchange Commission when one of Binstein's member firms was involved in factored business (2833). Late in 1963 he sued Binstein for a legal fee of $500 (2837-2839), which he ultimately collected.

The theory of the prosecution, as indicated by the Court below, was that petitioner aided and abetted frauds (2722). However, as was pointed out, there was no evidence of his knowledge that there would be no statements or that there would be omissions (2722). The record is devoid of any proof tending to establish motivation on the part of Kaufman—or, if there was any scheme, what benefit he was to derive from it (2234-2235). Nor is there any evidence that the vendors of stock told him that they planned to sell on the basis of misrepresentations or omissions. If the latter were illegal, surely there can be no presumption that Kaufman must have anticipated such conduct.

Incidental to this argument is the patent irregularity of the procedure followed. Hundreds of exhibits were introduced having no conceivable bearing upon petitioner over objections too numerous to mention—all, as was pointed out (2802), in violation of the principle of *Bruton* v. *United States*, 391 U.S. 123.

It was urged (2802) that "excess documentation, which the jury is unable to fully comprehend, has uselessly inundated this proceeding," and that it would be impossible for jury to ignore (with respect to Kaufman) evidence admitted against other defendants. It was further argued on his behalf that at least three conspiracies had been referred to or indicated, in none of which Kaufman was a party, but that this course had "confused and thwarted a proper trial" (2803).

With the scores of witnesses and the hundreds of exhibits, to say that the case was overtried would be a gross understatement. It would be difficult, if not impossible, to find a record of any criminal trial abounding in so many obscurities. Small wonder, then, that the trial judge, with commendable candor, was repeatedly constrained to admit his own bewilderment. Thus, at virtually every stage of the case we find him giving vent to

utterances like the following (and this enumeration is by no means complete):

"I am really confused" (302).
"I am confused" (1574).
"I must say I am a little confused" (1613).
"I am completely puzzled" (1940).
"This has been one of the most mysterious trials" (2545).
"I must say I am puzzled" (2599).
"I am confused here" (2833).
"I must say you lose me there" (2715).
"I am just completely puzzled" (2857).
"I don't really know what this is all about" (2885).
"I am puzzled as to what this really all is" (2893).
"I must say I am puzzled by this" (2894).
"I am amazed that the government would want to go into this" (2896).
"I must say this is incredible, this whole case" (3139).
"What in the world is this all about?" (3504).
"You baffle me . . . I do not know what you mean by that" (3491).
"One of the confusing things" (3509).

If the foregoing spontaneous reactions came from the experienced trial judge, what can we surmise to have been the frame of mind of each juror? In a trial extending over a period of more than six weeks, punctuated by countless conferences at the bench out of the jury's hearing, it is a safe inference that the triers of the facts were at least as confused, puzzled and baffled as the judge himself. It is possible that a severance, for which petitioner moved (2803), might have eliminated some of the difficulty.

In any event it is clear that the jury was left in a most muddled state, and faced a special problem in the effort to ascertain how or why petitioner, a mere attorney, could be criminally involved. This is attested by the fact that he was the last defendant as to whom they could come

to any conclusion, as well as by the two significant questions they propounded to the Court towards the close of their deliberations (these being the subject-matter of ground VII below).

If this Court should not be in accord with our contention that no case was proved against Kaufman, certainly there can be no question that the issues as to him were exceedingly close, so as to necessitate that all of his rights be scrupulously observed. Errors which could be overlooked as harmless in a situation where the preponderance of proof of guilt is overwhelming obviously cannot be ignored in a case where doubts have apparently arisen. Therefore, without detracting from our reliance upon the argument that petitioner's case should not even have been submitted to the jury, it is respectfully suggested that the other errors hereinafter treated be given the most careful consideration as factors which could easily, and probably did, have a bearing upon the verdict.

II.

The evidence failed to establish any use of the mails as charged and as required by 15 U. S. Code Sec. 77Q(a).

Counts 2 through 17 of the indictment herein—and petitioner was convicted under eleven of them—alleged a use of the mails in furtherance of an alleged scheme to defraud. Such use is simply stated to be the mailing to eleven named individuals of confirmations for various amounts of stock purchased. It is not claimed by the government that these confirmations contained any misrepresentations. The confirmations must be viewed as merely incidental and collateral, and to no extent essential to validate the transactions—precisely as a receipt, while evidencing payment, is not a prerequisite to render any payment effective.

Thus, where an indictment charged violation of 15 U. S. Code Sec. 77Q(a), as herein, and alleged that defendants caused to be delivered by mail a letter addressed to a specified person and such letter inquired as to how the individual wished a stock certificate issued, but contained no offer, promise or representation and employed no device or scheme to defraud, it was held merely incidental and collateral to the alleged scheme, and the trial judge, it was held, should have directed a judgment of acquittal. *Getchell* v. *United States* (C.A. 5), 282 F. 2d 681. Certainly the inquiry in that case, requesting instructions as to how stock was to be issued, clearly is more directly in furtherance of the scheme than a simple confirmation.

It will be further noted that the foregoing shortcoming of the proof is applicable not only to the substantive charges, but equally to the first count of the indictment, which is based on an alleged conspiracy to violate 15 U. S. Code Sec. 77Q(a), requiring, so far as is charged and is pertinent herein, proof that the mails were used in aid thereof.

III.

Any prosecution for conspiracy herein was barred by its claimed consummation.

An inspection of the indictment shows that the alleged conspirators and malefactors concealed and omitted to disclose that secret compensation was being offered and paid to securities salesmen and others for inducing persons to buy Donbar stock; and also that they omitted to disclose that the price of the stock was being manipulated, raised, rigged, maintained and otherwise affected. No argument is necessary to show that the substantive offenses claimed to have been committed in furtherance of the conspiracy necessitated the joint action or cooperation of two or more persons. Under such circumstances the alleged of-

fenders may not be prosecuted for both conspiracy and the substantive crimes. In other words, if the object of the alleged conspiracy requires for its commission concert of action among the conspirators and the conspiracy was in fact consummated, they may not be prosecuted both for the conspiracy and the substantive offense.

It is the settled law that where the substantive crime which is the object of the conspiracy charged has actually been committed, there can be no conspiracy to commit where "the substantive crime necessarily requires the mutual cooperation of those charged as the conspirators." *United States* v. *Sager* (C.A. 2), 49 F. 2d 725; cited by PALMIERI, *D.J.*, in *United States* v. *Stromberg* (S.D.N.Y.) 22 F. R. D. 513.

In *United States* v. *Zeuli* (C.A. 2), 137 F. 2d 845, the Second Circuit held (by L. HAND, *Circ. J.*):

> "Lower federal courts have several times decided that, if a crime necessarily involves the mutual cooperation of two persons, and if they have, in fact committed the crime, they may not be convicted of a conspiracy to commit it. . . . Although the Supreme Court has never actually so decided, it has twice clearly approved the doctrine; and we accept it as settled law. United States v. Katz, 271 U. S. 354; Gebardi v. United States, 287 U. S. 112."

The rule was clarified in *United States* v. *Center Veal & Beef Co.* (C.A. 2), 162 F. 2d 766, where L. HAND, *Circ. J.*, again wrote:

> "It does not mean that whenever conspirators have consummated the crime which they have planned, they can no longer be convicted of conspiracy. That might have been a good doctrine, but it is not the law. What it does mean is that, when the crime, which is the object of the putative conspiracy, requires for its commission some reciprocal action of the conspirators indicated, they may not be indicted for conspiring to commit it if they have

> in fact consummated it. This is because the crime presupposed their mutual agreement which was therefore a part of it."

Finally, in *Pinkerton v. United States*, 328 U. S. 640, 643, this Court referred with approval to the doctrine of the foregoing cases that there is no basis for "a conspiracy charge" as distinguished from the "substantive charge," "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime."

In the case at bar there can be no doubt that the crime charged as the object of the conspiracy required for its commission some reciprocal action of the conspirators. As a very minimum one had to promise a dealer or broker a secret compensation and the dealer or broker had to conceal this arrangement from the prospective purchaser. Therefore, upon the commission of the substantive crime a prosecution for conspiracy would no longer lie, so that the first count of the indictment must be dismissed.

IV.

The exclusion of evidence of the place of residence of the government's principal witness was reversible error.

It cannot be disputed that the prosecution's case rested upon the testimony of its chief witness, Mark P. Binstein (101-900), the archconspirator, who had pleaded guilty and was awaiting sentence (103). His testimony extended over five days and some eight hundred pages of the record. He was the one who enlisted the services of the three principals of Harris, Clare & Company—Clare, Summers and Winslow—in the scheme (154-160; 164-165). He repeatedly admitted having lied before the grand jury (*e.g.*, 345-346,

346-350, 369, 379-386, 428-431, 460, 530, 792-793). He was extremely hostile to petitioner, he distrusted him (366-367) and was actually sued by him for legal fees (342-343, 2837-2838).

Naturally the case turned in crucial measure upon his credibility, so that all measures directed towards its impeachment call for the fullest latitude permissible by law. Nevertheless, at the very outset of cross-examination by petitioner's counsel, when the question was put as to the place of residence of the witness, an objection was sustained (308-309). This ruling was clearly erroneous.

The leading case on this subject is *Alford* v. *United States*, 282 U. S. 687, where the petitioner had been convicted of mail fraud. One of the government's witnesses was a former employee of petitioner. Upon cross-examination, objection to a question seeking to elicit his place of residence was sustained. This ruling was held reversible error. Mr. Justice Stone wrote for this unanimous Court:

> "It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them. . . . To say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial."

Accordingly, the Court held that "the question 'Where do you live?' was not only an appropriate preliminary to the cross-examination of the witness," but also "an essential step in identifying the witness with his environment, to

which cross-examination may always be directed." Finally, the Court declared:

> "The trial court cut off in limine all inquiry on a subject to which the defense was entitled to a reasonable cross-examination. This was an abuse of discretion and reversible error."

That decision has been consistently followed, and, indeed, it was quoted at length with approval in *Smith* v. *Illinois*, 390 U. S. 129, where Mr. Justice Stewart said "we follow the standard of *Alford*," declaring:

> ". . . When the credibility of a witness is an issue, the very starting point in 'exposing falsehood and bringing out the truth' through cross-examination must necessarily be to ask the witness who he is and where he lives. The witness' name and address open countless avenues of in-court examination and out-of-court investigation. To forbid this most rudimentary inquiry at the threshold is effectively to emasculate the right of cross-examination itself."

Even though the witness there involved was one who was known to and had actually been a client of petitioner's defense counsel, the conviction was reversed.

And recently, in *District of Columbia* v. *Clowans*, 300 U. S. 617, the Supreme Court noted, in approving reversal, such a question may have "an important bearing on the accuracy and truthfulness of the testimony of the prosecuting witness."

Even the failure to disclose the prior address of a witness—which may open "new avenues of inquiry on cross-examination"—is deemed reversible error, as was recently held in *United States* v. *Varelli*, 407 F. 2d 735. Only where there is a provable threat to the life or safety of a witness may his address be withheld, but even there the government bears the burden of proving the existence of such threat. *United States* v. *Palermo*, 410 F. 2d 468. Of course, there is not the slightest suggestion of any such situation in the instant case.

As a matter of indisputable law, we submit that if there were no other ground for appeal but the refusal to permit the defense to ascertain Binstein's residence—with the innumerable facets of further cross-examination and investigation which that information would have afforded—the error was of a character to require reversal of the conviction.

V.

It was error to allow evidence of another alleged crime.

The witness Eveline Gold was permitted over objection to give testimony as to another alleged illegal and criminal transaction in which Florea, and by implication petitioner might have been supposedly involved, and the ensuing motion for a mistrial was denied (1580-1582).

No extended argument should be necessary in support of the classic doctrine—frequently referred to as the rule of *People* v. *Molineaux*, 168 N. Y. 264—barring proof of other offenses.

A leading decision of this Court on the subject is *Boyd* v. *United States*, 142 U. S. 450. There, on the trial of an indictment charging murder following an intent to rob, the trial court had admitted over objection evidence showing that the defendant had committed other robberies in the same neighborhood on various days shortly before the alleged killing. The Supreme Court reversed the conviction, holding the evidence to be highly prejudicial and inadmissible for any purpose. The decision was recently cited with approval in *Burgett* v. *Texas*, 389 U. S. 109.

An illustrative application of the rule is the decision in *United States* v. *Jacangelo* (C.A. 3), 281 F. 2d 574, where the Court declared (by Hastie, Circ. J.):

> "... The evidence of involvement in other crimes was intrinsically inadmissible as highly prejudicial

> information about a collateral matter not connected with the offense charged . . . This was a far more serious matter than the technical objection to the statement as hearsay. To inform the jury of prior crimes of a defendant is, in the view of the Supreme Court, so improper and so prejudicial that a mistrial must be declared, even when the jurors assert that they can and will disregard that information. Marshall v. United States, 360 U. S. 310."

We are aware of the qualifications of the rule as exemplified by the Court's holding in *United States* v. *Byrd* (C.A. 2), 352 F. 2d 570. Yet even there, in reversing a conviction, the Court held that where prejudice resulting from admission of proof of a prior similar offense, without any real necessity for such evidence, outweighs its probative value, its admission is an abuse of discretion.

The same principle was recently applied in *United States* v. *Phillips* (C.A. 7), 401 F. 2d 301, where the Court said (by Hastings, Circ. J.):

> "If the proffered evidence does not have substantial relevance outweighing its potentially unduly prejudicial effect, its admission is an abuse of discretion."

VI.

It was error to strike the testimony of petitioner's principal character witness, a New York Supreme Court Justice.

Petitioner called as a character witness New York Supreme Court Justice Louis B. Heller (2901-2906), the substance of whose testimony was as follows: that he had been a judge of the Court of Special Sessions and of the City Court prior to becoming a Supreme Court justice: he had previously been a New York State senator and a member of the United States House of Representatives; he had

known petitioner and his family for more than twenty years; he had attended family affairs with them; he saw him socially from time to time; and formed an opinion after talking with him on many occasions, which opinion was "a very good impression" (2906).

The government's objections to the following two questions were sustained (2904):

> "Q. During this tenure, have you ever heard any one say anything bad about Mr. Kaufman?"
>
> "Q. Have you ever heard anybody say anything negative with regard to Paul Kaufman?"

Because of the so-called negative character of the witness' opinion, the trial Court not only struck his entire testimony (2976-2977, 3194-3198) but also specifically in the charge directed the jury to disregard it, using the following language (4785):

> "In this connection I should pause and instruct you to disregard the testimony of one of the character witnesses called by Mr. Kaufman and that was the witness Louis Heller, Justice Louis Heller, for technical reasons which need not concern you at all. I some time ago directed that the testimony of Justice Heller be stricken, thus you should not consider it in your deliberation."

Although the character witnesses called by the several defendants were quite numerous—at least ten—Justice Heller was the only one mentioned by name in the instructions.

Incidentally, it may be noted that the Court permitted testimony of a character witness for another defendant (Garber) that he had never heard anything derogatory about him (3765-3766).

However the proffered proof may be regarded, or termed negative, the propriety of its admissibility is well

established. As this Court held in *Michelson* v. *United States*, 335 U. S. 469 (by Mr. Justice Jackson):

> "To require affirmative knowledge of the reputation may seem inconsistent with the latitude given to the witness to testify when all he can say of the reputation is that he has 'heard nothing against defendant.' This is permitted upon assumption that, if no ill is reported of one, his reputation must be good."

In support of the foregoing the opinion cited 5 Wigmore on Evidence, 2d ed., Sec. 1614; Underhill on Criminal Evidence, 4th ed., Sec. 171; and 1 Wharton on Criminal Evidence, 11th ed., Sec. 334. Wigmore, *supra*, states:

> ". . . The absence of utterances unfavorable to a person is a sufficient basis for predicating that the general opinion of him is favorable. A witness to *good reputation* may therefore testify by saying that he has *never heard anything said against* the person." (Italics in original.)

Wigmore also quotes from the leading case of *Regina* v. *Routon*, Leigh & C. 520, where Cockburn, C. J., wrote:

> "Negative evidence, such as 'I never heard anything against the character of the man,' is the most cogent evidence of a man's good character and reputation, because a man's character is not talked about till there is some fault to be found with it. It is the best evidence of his character that it is not talked about at all."

The rule has consistently been followed. "The fact that no reproach has ever been heard or known to have been uttered agains the character of a person . . . may be the very highest evidence that the general reputation of such person in such community is good." *People* v. *Dunham*, 344 Ill. 268, 176 N. E. 325. The exclusion of evidence that a witness has never heard anyone speak ill of the defendant requires a reversal of the conviction. *Gravitt* v. *State*, 220 Ga. 781, 141 S.E. 2d 893. And in *State* v. *Gam-*

butti, 36 N. J. Super. 219, 115 Atl. 2d 136, where a witness testified as to defendant's good reputation but admitted on cross-examination that his "answer was based upon what he knew of the defendant; but did not know what others thought of him but he had never heard anything otherwise," it was held error to strike his testimony.

Nor is this an error which can reasonably be overlooked. A Justice of the Supreme Court is certainly a person of high standing in the community, and one eminently qualified to express an opinion pertinent to the issue in a criminal prosecution. Jurors would undoubtedly accord proper weight to the circumstance that an outstanding personage was willing to vouch for this appellant's integrity. Yet we are confronted with a situation where, after the testimony is given, they are told that it has been stricken and are admonished to banish it from their minds and deliberations. It is easy to see that this course of events is even more prejudicial than the mere exclusion of proof. A fair assumption is that the average juror would conclude that Justice Heller for some dark and inexplicable reason must have recanted his opinion—with ensuing detriment to its subject. Since the law is clear that such testimony alone may be enough to raise a reasonable doubt of guilt (*Edgington* v. *United States*, 164 U. S. 361), the error is plainly reversible—especially in a case where the jury's extended deliberations, particularly as to petitioner, attest the difficulties attendant upon a resolution of the issue.

VII.

In answering the jury's specific questions concerning petitioner, the Court erred in its apparent affirmance of his guilt.

Late in the evening of the second day of the jury's deliberations, the jurors submitted to the Court the following note (4870-4871):

> "Your Honor, in an attorney-client relationship must such an attorney call 'authorities' if he is made aware of a 'conspiracy' by such client? If not, is he an accessory?"

Before answering, the Court invited comment by petitioner's attorney, who suggested simply that both questions be answered in the negative (4871). The Court responded that it would in effect tell them that the inquiry was irrelevant; that he was not charged with this but "with being a willing and knowing participant in a conspiracy" (4873). Thereupon Kaufman's attorney suggested that the Court "not put in what he is being charged with, because coming from the judicial hand it may seem there is an affirmance of his guilt or an affirmance of the charge against him" (4873). Under the circumstances a simple and direct answer to the note would have been substantially: An attorney is under no such duty, and his failure to call authorities does not make him an accessory.

Nevertheless, despite the previously voiced objection the Court proceeded to instruct the jury as follows (4874-4875):

> "Ladies and gentlemen, I, of course, have called you in because of this note which we received, which I believe was written by Juror No. 6, and let me answer it as follows:
>
> "I start out by saying that the answers to these questions would take us, in my judgment, away from

> the issues in our case. The charge here, of course, as you know, has nothing to do with amounting to a charge that a lawyer defendant heard about a conspiracy and failed to report it. That is not what our case is about. The charge is that the lawyer defendant, Mr. Kaufman, was a knowing and wilful member of the conspiracy as alleged in Count 1 and a knowing and wilful participant as an aider and abettor in the allegedly fraudulent sales of Donbar, which are the subject of the so-called substantive counts. And I would say to you that if all you were to determine here was that Mr. Kaufman heard about some conspiracy and failed to report it, and that was all, he would not be guilty of the charges in this indictment.
>
> "The charges in this indictment are just what I summarized. The Government contends it has proved that, and Mr. Kaufman denied he was in any way any participant knowingly and wilfully at all. So I think that for our purposes that is really all the answer I can give, and though the questions posed here are very interesting, it would take me off in some other areas which would be time consuming, irrelevant and perhaps even confusing to all of us. I am sorry, but I cannot really say any more than that."

Petitioner's attorney again objected to the tenor of the instruction on the ground "that a reaffirmance of the charge is indicative of guilt" (4875-4876).

It is undoubtedly the law that "where the jury make their difficulties explicit, the judge should clear them away with concrete accuracy" (23A C.J.S. 1000; *Bollenbach* v. *United States*, 326 U. S. 607). Recent applications of this principle include *Powell* v. *United States*, 347 F. 2d 156, and *United States* v. *Harris*, 388 F. 2d 373.

On the following afternoon the jury delivered to the Court another note, reading as follows (4901):

> "If I would negotiate a business arrangement knowing of a conspiracy and my recommended party engaged in illegal activity, would I then be directly or indirectly responsible for such illegal acts and/or become a member of such a conspiracy?"

The correct answer to this question is a simple "no," and petitioner's counsel suggested (4902):

> "I can give an answer to that question, and obviously it would be a negative one."

However, the Court actually gave the following instructions in response (4904-4905):

> "I turn to the question which was on the second of the two pages, and I start out by observing that I would be less than candid if I didn't tell you that I am not totally sure I understand this question or, to put it differently, I can interpret this question in several ways which would be totally irrelevant to our case.
>
> "Nevertheless, I am trying to cope with it in the context of our case, so let me observe the following:
>
> "First, if you were a lawyer and you had a client whom you well knew or you had very good reason to know was a member of a conspiracy, and if you then continued to represent him in other legal affairs having nothing to do with this conspiracy and, indeed, if you even negotiated a contract or some sort of arrangement, to use the word here, which, so far as you could determine after conscientious thought and investigation, had nothing to do with the conspiracy which you thought your client was a member of, you would therefore, under such circumstances, not become a knowing conspirator in the type of conspiracy charged in this case, at least, or, indeed, in any of the other illegal conduct alleged in this case.
>
> "On the other hand, if you were that lawyer and you knew that your client was involved in a conspiracy, for example, one substantially as charged here, and you then negotiated an arrangement or a contract knowing full well or having every reason to believe that it would assist and further that conspiracy in which you knew your client was involved in, then you would become a knowing, wilful member of the conspiracy, or, if you want to put it in a different fashion, you would become an aider and abettor of the conspiracy, and any illegal conduct which results from that conspiracy.

> "I think and trust that that answers what I conceive to be the substantial thrust of this question you pose in the context of our case."

The foreman immediately requested that this language be repeated. This was done, the Court also purporting to make an unintelligible correction, saying that the words "stemming from" should be substituted for "related from," although the latter words are not to be found (4906).

Due exception was taken to the answer (4906-4907).

The language employed by the Court was patently objectionable. In the first place, it dealt with the position of a lawyer and client, obviously pointing to petitioner—all at a time when the jury had not yet announced any verdict and in a case where other defendants were charged with making recommendations. Secondly, in order to escape criminal liability, an attorney was saddled with the burden to "determine after conscientious thought and investigation" whether any contract being negotiated was connected with a conspiracy, when the law actually imposes no such obligation. Thirdly, the Court vaguely declared that knowledge of a contract's being in and of a conspiracy carried with it responsibility for "any illegal conduct which resulted from that conspiracy"—a strange doctrine which would render one criminally answerable for the most remote consequences.

One cannot read the words used in reply to the simple query without construing them as an unfair invitation, if not direction, to convict petitioner—which indeed was done shortly thereafter (4913). When it is remembered that the jury had been deliberating for a long time and that the questions had been propounded towards the end, the importance of a concise, impartial and unweighted answer is evident. Even the order in which the words were uttered, concluding with a description of conduct establishing guilt, was such as to have an inevitable adverse impact on petitioner's defense.

These are striking illustrations of the wisdom of brevity as against an attempt at elaborate exposition in response to a simple question. Again heed may well be given to the Biblical admonition: "Let your communication be, Yea, yea; Nay, nay: for whatsoever is more than these cometh of evil" (Matthew V, 37).

The two foregoing supplementary instructions in response to the jury's questions were prejudicially erroneous, and especially, if not exclusively, harmful to petitioner.

Conclusion

The case is one in which a member of the bar, bearing an excellent reputation, has been unjustly convicted and sentenced to a term of imprisonment. It is further manifest that the present application presents meritorious and certainly arguable questions on subjects likely to arise in other cases and of a character calling for authoritative disposition. The petition is filed in good faith and not for purposes of delay.

For the foregoing reasons, your petitioner respectfully prays that a writ of certiorari issue to the United States Court of Appeals for the Second Circuit, to the end that this cause may be reviewed and determined by this Court; that the determintaion, order and judgment of the said Court of Appeals may be reversed, and that petitioner be granted such other, further and different relief as may seem proper.

Dated: New York, N. Y.,
August 20, 1970.

Paul M. Kaufman

By Jacob W. Friedman
Attorney for Petitioner

Barry I. Slotnick
Raymond F. Narral
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of Counsel

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 564-7—September Term, 1969.

(Argued March 18, 1970 Decided July 22, 1970.)

Docket Nos. 33979, 33980, 34004, 34348

UNITED STATES OF AMERICA,

Appellee,

v.

PAUL M. KAUFMAN, STEVEN BURNS, ALAN FLOREA, and IRVING GARBER,

Appellants.

Before:

MOORE and FEINBERG, *Circuit Judges;*
BONSAL,* *District Judge.*

Appeal by defendants from judgments of conviction of conspiracy under 18 U.S.C. § 371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§ 77 q(a) and 77x) and of substantive violations of said sections entered after a jury trial in the United States District Court for the Southern District of New York, Harold R. Tyler, *J.*

Affirmed.

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* Of the Southern District of New York, sitting by designation.

DANIEL J. SULLIVAN, Asst. United States Attorney (Whitney North Seymour, Jr., United States Attorney for the Southern District of New York; William B. Gray, Arthur A. Munisteri, Asst. United States Attorneys, on the brief), *for Appellee.*

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BURTON S. COOPER, New York, N. Y. (Shatzkin and Cooper, New York, N. Y.; Edwin L. Smith, on the brief), *for Appellant Garber.*

BONSAL, *District Judge*:

Paul M. Kaufman, Stevens Burns, Alan Florea and Irving Garber appeal from judgments of conviction entered against them on July 29, 1969 after a seven-week trial before Judge Tyler and a jury. The indictment (68 Cr. 485) was filed on June 3, 1968 and charged ten defendants in seventeen counts. Five defendants, including the four appellants, went to trial, and twelve counts went to the jury. Count 1, the conspiracy count, charged a conspiracy under 18 U.S.C § 371 to violate the anti-fraud provisions of the Securities Act of 1933 (15 U.S.C. §§ (7q(a) and 77x). The eleven substantive counts charged violations of these sections in sending confirmations of stock transactions through the mails. The substantive counts are also de-

scribed as overt acts in the conspiracy count as acts done pursuant to the alleged conspiracy. Defendant Seigenfeld was acquitted by the jury with respect to the conspiracy count, the only one in which he was charged.

The jury convicted all four appellants under the conspiracy count; Kaufman and Burns on counts 3, 5, 8 and 9, in which they alone were charged; and Kaufman on counts 10, 11, 12, 13, 15, 16 and 17, in which he alone was charged.[1] For the reasons hereinafter stated, we affirm the convictions of each of the appellants.

Statement of Facts

Daniel Kroll, who died in August 1963, was the former president of Donbar Development Corporation (Donbar), which was engaged in the development, building and sale of interracial residential real estate on Long Island and in New Jersey. In January 1963, Kroll lost a proxy fight and was removed from the presidency of Donbar. He owned 82,000 unregistered shares of Donbar, a thinly traded stock selling in the over-the-counter market. A part of his holdings was tied up in a voting trust agreement.

In March 1963, with the assistance of appellant Kaufman's law firm, Kroll obtained a no-action letter from the S.E.C., and later in the month began selling some of his available Donbar stock. He encountered difficulties and, in early April, asked for assistance from Mark Binstein, the

[1] Defendants were sentenced on July 29, 1969. Kaufman received concurrent nine-month sentences and a $2,000 fine on each count, but execution of the prison term was suspended on all except the first count. Burns received concurrent four-month sentences and a fine of $1,000 on each of the Counts 1, 3, 5, 8 and 9, but execution of the prison term was suspended on all but the first count. Florea received a sentence of four months imprisonment on Count 1, the execution of which was suspended, and a fine of $1,500. Garber received a sentence of three months imprisonment and a fine of $1,000 on Count 1.

chief Government witness, who, at the time, maintained an office under the name of National Market Relations, Inc. and employed a Mrs. Eveline Gold on a part-time basis.

Kroll, Binstein and appellant Garber, the owner and operator of an unincorporated over-the-counter securities firm, called Nassau Securities Service, worked out a scheme to sell some 40,000 shares of Kroll's Donbar stock to the public. The scheme involved the paying of cash bribes to salesmen, selective buying to raise and support the market price of the stock, controlled selling so as not to depress the market, and the "squeezing" of short sellers. Appellant Garber was to cause enough Donbar shares to be bought to raise its price from 3-3½, to 4¼-4¾. Appellant Kaufman joined the scheme and brought in S. C. Burns & Co., Inc. and its president, the appellant Steven Burns, to participate in the distribution of the Kroll stock. Cash payments were made to Burns in return for retail sales by his firm, and the payments were escrowed with Kaufman until the Burns sales had been completed. Kaufman introduced the principals of Harris, Clare & Co., clients of his law firm, to Kroll, and told them they would receive $1.00 cash per share for Kroll stock they sold to customers. Appellant Florea agreed to find brokers to take Donbar stock, and was to receive from Binstein 25¢ in cash for each share so taken. One of these brokers was Seigenfeld, who was acquitted of conspiracy by the jury. Florea was paid in cash by Binstein for his services.

The scheme was carried out during May and June, 1963. The selling of Kroll's available Donbar stock was substantially completed in June, 1963. His shares were sold at prices ranging from $3.00 to $4.00 per share, and thereafter the price dropped to $1.50 to $2.00 per share. None of the retail purchasers who bought Donbar stock were told of the cash payoffs which were made to salesmen to stimulate their recommendations or that the price of the stock was being rigged while they were buying.

Sufficiency of the Evidence

The jury having found each of the appellants guilty, the evidence must be viewed most favorably to the Government. *Glasser* v. *United States*, 315 U.S. 60, 80 (1942); *United States* v. *Bowles*, — F.2d —, Docket Nos. 34335-6, 34497 (2d Cir., June 16, 1970), Slip Op., 3311, 3312; *United States* v. *Tropiano*, 418 F.2d 1069, 1075 (2d Cir. 1969), *cert. denied*, — U.S. — (38 U.S.L.W. 3388, April 6, 1970); *United States* v. *Kahaner*, 317 F.2d 459, 467 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). So viewed, the evidence established an unlawful conspiracy to sell Kroll's Donbar stock through the use of fraudulent and manipulative devices, and the participation of each of the appellants in the conspiracy.

The Government was not required, as appellants contend, to prove that each appellant was involved in all phases of the conspiracy. It was sufficient for the Government to prove that each of them knowingly joined the conspiracy to sell the stock by the use of fraudulent and manipulative devices. *United States* v. *Dardi*, 330 F.2d 316, 327 (2 Cir.), *cert. denied*, 379 U.S. 845 (1964) and cases cited therein. The evidence establishes that Garber aided Binstein and Kroll in setting up the scheme and undertook to supervise the distribution of the Donbar stock. Mrs. Gold and Binstein went to Garber's office to obtain information concerning the market operations. Kaufman, as Binstein and Kroll's attorney, actively participated in the conspiracy and acted as escrow agent for the cash payments to be made to appellant Burns and received cash from Binstein for that purpose. Burns does not deny that he was to receive payments from Kaufman, but he contends that he did not know of the market rigging aspect—"one prong of the prosecution's two-pronged scheme and conspiracy theory." As stated above, it is immaterial that he may not have known of all of the facets of the conspiracy.

Appellant Florea strenuously contends that he was not a member of the conspiracy, and we consider the evidence as to his participaion in more detail.

Florea asserts that there is no evidence of his agreement to effect fraudulent sales of Donbar stock to the public, and that his participation was limited to the "buy" function. Binstein testified that following his first meeting with Kroll, he met with Florea and told him in detail what was contemplated—"that Mr. Kroll would pay $100 per 100 shares for anybody who wanted to participate in the corner, and in the run-up of the stock of Donbar Development Corporation." Binstein testified that,

> "The brokers were told to buy the stock, to put in for clients or trading accounts or anything, but to be put away, not to be sold immediately thereafter, immediately after buying it,"

and that this was in substance what he told Florea.

Binstein testified that Florea visited his office on a number of occasions in May-June, 1963 in connection with the sale of Donbar stock. He testified that Florea "was coming to both collect money for himself and the people he had brought into the Donbar situation, and on a couple of occasions just to come to check [Binstein's daily progress report] . . . to see what buying was done by whom, to make sure he received what he thought he was entitled to." Binstein also testified that Florea had introduced him to Seigenfeld and Dietz Securities. Binstein testified that Florea demanded compensation for his services with respect to Harris Clare and Dietz Securities and that he made a number of cash payments to Florea in connection with Dietz and Harris Clare. Mrs. Gold testified concerning discussions between Florea and Binstein in Binstein's office that,

> "He [Florea] was discussing the amount of money that Binstein owed him for putting certain buying into Donbar although I never actually saw him get paid,"

and that

> "Mr. Florea was claiming compensation for Dietz buying."

Florea testified that he had never heard of Kroll and that he first heard of the Donbar company in 1967, in the U. S. Attorney's office. Florea conceded only that he knew Binstein, as they had been at West Point together. He testified that he never introduced any brokers to Binstein for the purposes of buying or selling Donbar, and he denied receiving any payments from Binstein in connection with Donbar stock. On cross-examination, Florea testified that he occasionally went to Binstein's office, where he saw Binstein and Mrs. Gold. Florea conceded that he could have heard about Donbar in 1963, that he may have told the U. S. Attorney in 1968 that Donbar was represented by Binstein in a public relations capacity, and that he may have heard Kroll's name mentioned in Binstein's office. He also testified that he knew Kaufman and may have seen Burns socially.

The evidence with respect to Florea presented a question of credibility for the finder of fact—whether to believe Binstein or to believe Florea. The jury deliberated two days and considered the evidence with great care, which is demonstrated by the fact that they acquitted Seigenfeld. The evidence establishing that Florea knowingly participated in the conspiracy, knowing both about the fraudulent sale of the Kroll stock to the public as well as the market support operation, was sufficient if the jury believed it—and they did.

Therefore, the evidence establishes that each of the appellant was a member of the conspiracy charged in the first count. Florea contends that the proof fails to show that he knew that the mails would be used in carrying out the conspiracy. However, the proof was sufficient to enable the jury to find that Florea knew that the mails would be used in connection with the distribution of Kroll's Donbar stock. Indeed, as a "registered representative," Florea must have known that the mailing of confirmations was routine in the sale of securities on the over-the-counter market.

Moreover, the proof showed that the confirmations which were the subjects of the overt acts in the conspiracy count and of the substantive counts, were in fact mailed, and that they were mailed in furtherance of the conspiracy. Therefore, the jury having found Kaufman and Burns guilty under the conspiracy count, could find them guilty under the substantive counts as well. They jury was not required to find that Kaufman or Burns knew or should have foreseen that the mails would be used in sending the confirmations listed in the substantive counts. The mails are included in the statute as a ground for Federal jurisdiction. The recent decision of *United States* v. *Blassingame*, — F.2d —, Docket No. 33988 (2d Cir., June 1, 1970) overruling *United States* v. *Houlihan*, 332 F.2d 8 (2d Cir.), *cert. denied*, 379 U.S. 828 (1964) holds that the essence of the crime is the fraudulent scheme itself and that there is no reason why guilt under the statute should hinge upon knowledge that interstate communication or the mails were used. Since Kaufman and Burns were members of the conspiracy and the mailings were overt acts in furtherance of the conspiracy, they were properly found guilty of the substantive counts by reason of the fraudulent scheme in which they knowingly participated.

We find, therefore, that the evidence was sufficient to support the jury's conviction of the appellants on all counts.

Government Exhibit 1

Government Exhibit 1, which was received in evidence over objection, was Binstein's daily progress record of the sales of Kroll's Donbar stock and the cash payoffs. The record started on May 16 and continued to June 6, 1963. It contains a number of corrections, side notes, and computations. Appellants Burns, Florea, and Garber urge that Government Exhibit 1 was not a business record and should not have been received in evidence. However, Exhibit 1 was a contemporaneous record kept in the ordinary

course of business and was properly received. *United States* v. *Re*, 336 F.2d 306 (2d Cir.), *cert. denied*, 379 U.S. 894 (1964). It was a record kept in furtherance of the conspiracy. The items were documented by other brokerage records and corroborated by testimony at the trial. It was clearly a business record kept for a business purpose. Therefore, Government Exhibit 1 was properly admitted, and it was for the jury to determine the weight to be given it.

Government Exhibits 401-406—The Braun Schedules

A more difficult issue is presented by the Braun schedules. Braun was Kroll's accountant. He testified that he prepared these schedules on or immediately after June 11, 1963, following a meeting which he had with Kroll and Binstein, and that the schedules set forth information contained in Government Exhibit 1, which they furnished him, supplemented by information given to him by Kroll and Binstein at the June 11 meeting. There was evidence to indicate that the purpose of these schedules was to serve as an accounting between Kroll and Binstein, and perhaps to be used in a tax fraud in which they alone were engaged. The Braun schedules were not offered by the Government during the Government's direct case. Braun was called as a witness by appellant Florea, apparently in an attempt to contradict Binstein's testimony that Braun had laid out the format of Government Exhibit 1. In cross-examining Braun, the Government offered the Braun schedules to corroborate Binstein's testimony. The Government made effective use of the Braun schedules at the trial and in the course of its summation.

Appellants raised timely objections to the introduction of the Braun schedules, which objections were overruled. On this appeal, they contend that the Braun schedules should have been excluded under the hearsay rule and that the trial judge's failure to do so seriously prejudiced their

rights to a fair trial. Appellants assert that the conspiracy had terminated before June 11 and that, therefore, the Braun schedules were not and could not have been prepared in furtherance of the conspiracy, and were therefore mere prejudicial hearsay as to them.

However, the evidence indicates that the conspiracy had not come to an end when the Braun schedules were prepared. The settlement dates on various sales of the stock did not occur until after June 11, and other activities in connection with the distribution of the stock were not finally concluded until June 24, 1963. We note that much of the information contained in the Braun schedules had been previously set forth in Government Exhibit 1. Moreover, even if the Braun schedules were in the nature of an accounting between the primary conspirators, Binstein and Kroll, they also revealed the status of the conspiracy with respect to the appellants. As such, they were properly received as a business record made before the final termination of the conspiracy, setting forth the interests of those involved. *United States* v. *Cohen*, 384 F.2d 699, 701 (2d Cir. 1967); *United States* v. *Hickey*, 360 F.2d 127, 143-44 (7th Cir.), *cert. denied*, 385 U.S. 928 (1966); *United States* v. *Re*, *supra*. The appellants were given adequate opportunity to cross-examine Braun with respect to the schedules and to argue in their summations the weight to be given them by the jury.

Other Contentions

The remaining contentions of the appellants do not require extended discussion.

Appellants Florea, Kaufman, and Garber contend that their cross-examinations of the Government witnesses were unduly restricted by the trial judge, but we find these contentions to be without merit. The trial judge in a lengthy trial must be afforded reasonable discretion to limit cross-examination, and we do not find that the trial judge abused

this discretion, *United States* v. *Crosby*, 294 F.2d 928, 944 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962). Appellants complain that they were not allowed to cross-examine Binstein regarding his relationship with a professional basketball team or whether he had informed his associates in that venture that in return for testifying "he was not going to get a jail sentence." The record reveals that this issue came up out of the hearing of the jury when Seigenfeld's attorney engaged in a lengthy colloquy with the trial judge. At the end of it, the trial judge allowed Seigenfeld's attorney to ask the questions in another form, but he didn't follow it up and neither did the attorneys for the appellants. Nor was it error for the trial judge to preclude inquiry as to Binstein's address. *United States* v. *Persico*, — F.2d —, Docket Nos. 34016, 34119, 34235, 34344 (2d Cir., April 15, 1970). In view of the prior relationship between Binstein and appellants, it is hard to see why this was prejudicial, nor did any of the appellants advance sufficient reason to show that it was prejudicial.

Kaufman and Florea contend that the trial judge erred in allowing testimony by Mr. Gold concerning a prior illegal stock distribution in which Florea and Binstein, and perhaps Kaufman, were involved. However, except for statements made by Mrs. Gold outside of the hearing of the jury, her testimony does not contain any references to prior illegal acts in which the appellants were involved.

Appellant Garber, who appeared *pro se* throughout the trial, contends that he was improperly restrained by the trial judge and that these restraints violated his constitutional right not to testify. Garber's argument is totally without merit. The record shows that from time to time he made statements directly to the court and jury and was properly restrained by the trial judge. Indeed, to the extent that some of his statements might be construed as testimony he may have waived his right to refuse to testify. See, *United States* v. *Lacob*, 416 F.2d 756, 760 (7th Cir. 1969), *cert. denied*, — U.S. —, 38 L.W. 3287

(1970); *Redfield* v. *United States*, 315 F.2d 76, 80 (9th Cir.), *cert. denied*, 369 U.S. 803 (1963). During the course of Garber's rambling cross-examination of Binstein, the trial judge remarked, "Don't ask him that kind of thing. Ask him questions having to do with what he has testified to on direct examination by Government counsel. You will have a chance later to tell your side of the story, if you care to." Garber has made no showing that the trial judge's remark was prejudicial error. *See, United States ex rel. Miller* v. *Follette*, 397 F.2d 363, 367 (2d Cir. 1968), *cert. denied*, 393 U.S. 1039 (1969). Throughout the trial, the trial judge sought to protect Garber's constitutional rights, and, indeed, he helped him on various occasions to frame proper questions.

Appellant Kaufman contends that the trial judge erred in striking the testimony of New York Supreme Court Justice Louis B. Heller, his principal character witness. However, Justice Heller was unable to testify as to Kaufman's reputation in the community. He testified only that he knew the appellant and his family, had seen him socially, and that the appellant made "a very good impression" on him. He did not testify as to the community in which Kaufman lived or the circles in which he moved, and hence could not speak with authority as to his reputation in the community. *See, Michelson* v. *United States*, 335 U.S. 469, 478 (1948), 3 Wigmore, Evidence, §691 at 17 (3d ed. 1940).

Appellant Garber complains that his Fifth Amendment privilege against self incrimination was denied him when the District Court ordered the production of his noncorporate business records pursuant to a Grand Jury subpoena. He had discontinued his business prior to the issuance of the subpoena. As a registered broker-dealer, Garber was required by S.E.C. regulations to make and keep the records in question so that the same would be available for inspection and examination, and the protection of the Fifth Amendment does not apply. *Shapiro* v.

United States, 337 U.S. 1, 32 (1948); *United States* v. *Pine Valley Poultry Distributors Corp.*, 187 F. Supp. 455, 457 (S.D.N.Y. 1960).

Appellant Burns contends that he was prejudiced by the trial judge's refusal to allow him to go to trial with defendant Seigenfeld's former lawyer. Seigenfeld's lawyer moved to disqualify his predecessor from representing Burns at the trial or, in the alternative, for a severance of Seigenfeld. The lawyer opposed the motion and later sought a writ of mandamus directing Judge Tyler to permit him to continue as Burns' attorney—which was denied by the Court of Appeals (*Burns* v. *Tyler*, Docket No. 33376, March 21, 1969). The trial judge was well within his discretion in directing Burns to obtain another lawyer in view of the possible conflict of interest between Burns and Seigenfeld. *See, Consolidated Theatres* v. *Warner Bros. Circuit Management Corp.*, 216 F. 2d 920 (2d Cir. 1954); *T. C. Theater Corp.* v. *Warner Bros. Pictures, Inc.*, 113 F. Supp. 265 (S.D.N.Y. 1953) Indeed, the wisdom of this exercise of discretion was demonstrated by the acquittal of Seigenfeld and the conviction of Burns

Burns also contends that since he was acting as principal and not as broker in the sale of the Donbar stock, he had no duty to disclose to customers the cash payments which he was receiving. (*See, United States* v. *Bilotti*, 380 F.2d 649, 657 n. 17 (2d Cir.), *cert. denied*, 389 U.S. 944 (1967); *United States* v. *Haynie*, 398 F.2d 944, 949 (2d Cir.), *cert. denied*, 393 U.S. 961 (1968).) However, the receipt of these cash payments and the failure to disclose their receipt to customers was circumstantial evidence to be considered by the jury in determining whether or not Burns was a member of the conspiracy to sell the Donbar stock through the use of manipulative and unlawful devices.

Garber claims that his participation in the conspiracy terminated on June 3, 1963, on the ground that after that date he no longer bought Donbar stock but, on the con-

trary, was selling it—which he says is "evidence that the conspiracy had failed. *See Fishwick* v. *United States*, 329 U.S. 211, 91 L.Ed. 196, 200." He therefore contends that the statute of limitations had run as to him. However, there is no evidence from which the jury could have concluded that Garber affirmatively withdrew from the conspiracy on or before June 3, and he therefore remained tied into the conspiracy with respect to overt acts committed by other members of the conspiracy after that date.[2] Moreover, the evidence showed that Garber's activities in supervising the distribution of the Donbar stock continued after June 3.

The remaining allegations of error require no comment, and the conviction of the appellants is affirmed.

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[2] The trial judge had originally charged the jury that they must find at least one overt act was committed prior to June 3. After this was brought to his attention, he corrected his charge and instructed the jury that "at least one of the overt acts [was] allegedly committed on or after June 3, 1963." The trial judge told the jury that June 3, 1963 was the cutoff date for the statute of limitations and that it was for this reason that the jury must find that at least one of the overt acts took place on or after that date.

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